U.S. Department of Labor

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Issue Date: 18 May 2006

CASE NO.: 2005-LHC-127

OWCP NO.: 07-164053

IN THE MATTER OF:

PAUL E. BEHLER (Deceased)

Claimant

v.

ENERGY CATERING SERVICE, INC.

Employer

and

EAGLE PACIFIC INSURANCE COMPANY

Carrier

APPEARANCES:

JEREMIAH A. SPRAGUE, ESQ.

For The Claimant

TODD A. DELCAMBRE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act or LHWCA), brought by Paul E. Behler (Claimant)

against Energy Catering Service, Inc. (Employer) and Eagle Pacific Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 13, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eleven exhibits, Employer/Carrier proffered seven exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on June 12, 2002.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on June 12, 2002.

5. That Employer/Carrier filed a Notice of Controversion on July 10, 2002.

6. That an informal conference before the District Director was held on August 19, 2003.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from June 14, 2002 through January 24, 2003 at a compensation rate of $147.00.

8. That medical benefits have been paid to Claimant pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Jurisdiction.

2. Whether temporary total disability is owed from January 24, 2003 through April 15, 2004.

3. Whether Claimant has reached maximum medical improvement.

4. Claimant's average weekly wage.

5. Prescription.

6. Section 33(g) preclusion.

III. STATEMENT OF THE CASE

Background

On June 12, 2002, Claimant was disembarking from a boat to the dock when he felt pain in his knee. (EX-2). Claimant was in the employ of Employer and had been assigned to work on an UNOCAL platform at the time of his accident. On July 11, 2003, Claimant filed a claim for compensation. Claimant subsequently filed a complaint in the U.S. District Court for the Eastern District of Louisiana for negligence pursuant to the general maritime law. (EX-7). While the law suit was still pending, Claimant died. On April 18, 2005, the complaint filed in U.S. District Court was removed from the trial docket as resolved. (EX-7, ex. E).

The Testimonial Evidence

Ronald Gautreaux:

Ronald Gautreaux testified at the formal hearing. He stated that he worked as safety manager and human resources

manager and handled claims for Employer from September 1999 until September 2005. Mr. Gautreaux explained that Employer provides catering and janitorial services offshore in the Gulf of Mexico. (Tr. 18, 19).

Mr. Gautreaux handled the claim regarding Claimant. Claimant worked as a galley hand (now called a utility hand by Employer) during his employment with Employer. The duties of a galley hand included janitorial work such as making beds, cleaning floors and bathrooms, washing dishes, tables and clothes and wiping down walls. Galley hands work on both vessels and platforms and their duties are the same regardless of the location of their work. Customers of Employer send in weekly evaluations ranking the performance of the workers supplied by Employer. If a customer is pleased with a particular employee, it will often request that the employee return to work on its vessel or platform. (Tr. 19, 20).

According to Employer's pay records, Claimant spent most of his time working on the PIPELINER V, which is a pipe-laying barge, owned by Global Industries. (EX-1). Global Industries is Employer's largest customer. Mr. Gautreaux explained that the old computer system would not provide on which jobs Claimant had worked, so he went back and pulled the records and wrote the specific jobs in by hand. According to Mr. Gautreaux's calculations of Claimant's work history, Claimant worked on the PIPELINER V about 38 percent of the time. That figure was computed by adding up Claimant's total number of work hours and dividing by the number of hours that he worked on the PIPELINER V. Global Industries had been pleased with Claimant's work and often requested him back on the PIPELINER V. (Tr. 21, 24, 28; EX-1).

Mr. Gautreaux testified that Claimant worked on five different Global Industries barges: the PIPELINER V, the SEA CONSTRUCTOR, the CHICKSAW, the HERCULES, and the CHEROKEE. Claimant thus worked on Global Industries' vessels about 58 percent of the time. Mr. Gautreaux testified that all five of these vessels are offshore vessels which stay out in the Gulf for extended periods of time. The vessels need galley hands on board to provide the crew with food and clean accommodations. Mr. Gautreaux confirmed Claimant had worked as a galley hand during his entire 18 months of employment with Employer. (Tr. 28).

The last job on which Claimant was assigned was the SMI-6, an UNOCAL platform. Mr. Gautreaux testified Claimant was sent

on this assignment because he was ready to go to work, but his normal job, on the PIPELINER V, did not need a crew change at that time, and there was an opening with the SMI-6. Mr. Gautreaux stated Claimant most likely would have returned to his normal job on one of the Global Industries barges within the next week. Mr. Gautreaux explained that Claimant was well liked on the Global barges and the assignment to the UNOCAL platform was probably temporary. (Tr. 29, 30).

On cross-examination, Mr. Gautreaux reiterated that Claimant's job with UNOCAL was temporary. He stated that even if UNOCAL was pleased with Claimant's work and requested him back, Claimant was already assigned to Global Industries. Since Global Industries was Employer's largest customer and UNOCAL accounted for only about five percent of Employer's business, Mr. Gautreaux was certain Claimant would have continued working with Global Industries[2]. (Tr. 31).

Mr. Gautreaux testified that Claimant had been assigned to 14 different rigs or vessels, with five different owners. (EX-1). Employer did not own any of the platforms, barges or vessels, nor did it have any charter party agreements in place for use at any of these platforms, barges or vessels. Employer was only there to provide utility hand/galley hand services to these companies. (Tr. 32).

Mr. Gautreaux testified Claimant's accident occurred on a crew boat sitting at the dock waiting to go out to the platform. He did not know who owned the crew boat, but it was chartered by UNOCAL. None of the five companies Mr. Gautreaux had listed as Claimant's main assignments owned the crew boat. (Tr. 33).

Mr. Gautreaux testified that he considered the PIPELINER V, the SEA CONSTRUCTOR, the CHEROKEE, the CHICKSAW, the HERCULES, the SUNLAND CONSTRUCTION and the INTEL all to be vessels because they float in the water. Of these, the INTEL is the only one that is self-propelled. The others are pushed by tugboats or other means of propelling. On further examination, Mr. Gautreaux testified that he considered a floating structure to be a vessel as opposed to a fixed structure which is anchored to the floor of the Gulf of Mexico and cannot be moved. (Tr. 34, 35, 36).

[2] Mr. Gautreaux stated it was more important to keep Global Industries satisfied than UNOCAL because Global Industries was Employer's largest customer.

Mr. Gautreaux could not state with certainty whether or not Claimant was aboard any of these vessels while they were underway because he did not know where the vessels were moving at the specific time Claimant was aboard them. He explained the vessels are actively moving, by anchors and tugs, in the Gulf laying pipe. However, Mr. Gautreaux also stated the vessels are anchored at sea in the waters. He testified that none of the vessels have a raked bow, but all of them have running lights because they move in the Gulf and have to be marked. The INTEL is a self-propelled vessel with a raked bow. Mr. Gautreaux also stated that all of these vessels are pipe-laying barges which have to be moving to lay pipe[3]. Mr. Gautreaux testified he always has employees who have to make a transfer from the crew boat to the barge while the barge is in motion. (Tr. 37, 38, 39).

Mr. Gautreaux explained that the barges lay pipe by setting an anchor five miles away and then pulling themselves on the anchor as the pipeline is being laid. The tugboat then moves the anchor further away and repeats the process. The barge must stay in a straight line while it is being pulled; thus the anchors are floating anchors that do not move and the barge is pulled to the anchor. When the barges are not being pulled by anchor, they are propelled by tugs. (Tr. 40)

The Contentions of the Parties

Claimant asserts that he was a longshoreman and entitled to compensation benefits under the Act. Employer on the other hand contends that Claimant was a seaman under the Jones Act and thus the undersigned has no jurisdiction over this matter. I agree with Employer and, for the reasons discussed below, dismiss this case for lack of jurisdiction.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the

[3] All of the Global Industries vessels lay pipe in the Gulf of Mexico. The SUNLAND CONSTRUCTION lays pipe inland in the marsh.

proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g*. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. *Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).

Jurisdiction

Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), excludes from coverage "a master or member of a crew of any vessel." The term "member of a crew" is synonymous with the term "seaman" under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991). An employee is a "member of a crew" if: (1) his duties contributed to the vessel's function or to the accomplishment of its mission, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT)(1991); and (2) he had a connection to a vessel in navigation that was substantial in terms of both its duration and its nature. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172 (1995); *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT)(1997).

In order to determine whether Claimant is a seaman, I must first decide whether the PIPELINER V is a "vessel" within the meaning of the Act. Recently, the Supreme Court in *Stewart v. Dutra Construction Company, Inc.*, 543 U.S. 481, 486 (2005), addressed the issue of whether certain watercraft are considered "vessels". The Court explained that the term "vessel," for purposes of both the Jones Act and the LHWCA, is defined in Section 3 of the Rules of Construction Act, 1 U.S.C. §3 (previously codified at the Revised Statutes of 1873, 18 Stat. pt. 1, p. 1). *Id.* at 489. 1 U.S.C. §3 states: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

In *Stewart*, the Court determined that the *Super Scoop*, a massive floating platform with a suspended clamshell bucket used to dredge silt from the floor of the Boston Harbor was a vessel. *Id.* at 498. Although the *Super Scoop* had certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area, it had only limited means of self-propulsion. *Id.* at 484. It moved long distances by tugboat and short distances by manipulating its anchors and cables. *Id.* The Court explained that even prior to the passage of the Jones Act and the LHWCA, it had considered dredges to be vessels[4]. *Id.* at 491. Therefore, the Section 3 definition merely codified the meaning the term "vessel" had acquired in general maritime law. See *Id.*

The Court noted the longstanding distinction drawn by general maritime law between watercraft temporarily stationed in a particular location and those permanently fixed to shore or resting on the ocean floor. *Id.* at 493-94. The Court acknowledged that while Section 3's definition of a vessel sweeps broadly, there is some limit to what is considered a vessel because, "… a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* at 494.

The Court further noted Section 3 requires only that a watercraft be "used or capable of being used, as a means of transportation on water" to qualify as a vessel. *Id.* at 495. This does not mean a watercraft has to be used primarily for that purpose. *Id.* The Court also pointed out that a watercraft does not pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident. *Id.* Accordingly, the Court held the *Super Scoop* to be a vessel.[5]

The *Super Scoop* and the PIPELINER V have similar characteristics, for example, both have navigational lights and a crew dining area[6]. They also both have limited means of self-

[4] Since the passage of the Jones Act and the LHWCA, the Supreme Court had continued to find that dredges and comparable watercraft qualify as vessels. *Stewart*, 543 U.S. at 492.

[5] The Super Scoop's primary purpose was dredging rather than transportation, and it was stationary at the time of the claimant's accident.

[6] No detailed physical description of the PIPELINER V was provided in the record; therefore I can base my decision only on those limited physical characteristics that were presented. I can ascertain that the PIPELINER V had a crew dining area because Claimant's job as a galley hand included helping to prepare the food for the crews' meals and cleaning up afterward. (CX-11, p. 6)

propulsion. Both the *Super Scoop* and PIPELINER V are moved long distances by a tug boat. For short distances, the *Super Scoop* moved by manipulating its anchors and cables; similarly, the PIPELINER V moves short distances by pulling itself on its anchor. The *Super Scoop* moved about once every hour while dredging the trenches. As Mr. Gautreaux explained, the PIPELINER V lays pipe in the navigable waters of the Gulf of Mexico by setting an anchor five miles away and then pulling itself on the anchor as the pipeline is being laid. The tugboat then moves the anchor further away and the PIPELINER V repeats this function. The PIPELINER V has to be moving in order to lay pipe. Consistent with *Stewart*, I find the PIPELINER V falls within the parameters of "a watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 543 U.S. at 489.

The Fifth Circuit in *Holmes v. Atlantic Sounding Company, Inc.*, 437 F.3d 441, 443 (2006), recently provided additional support for finding the PIPELINER V is a "vessel" when it determined that a non-powered floatable barge (BT-213) used to house and feed employees during dredging projects at various locations fit within the *Stewart* Court's definition of a vessel. In *Holmes*, the barge in question is totally incapable of self-propulsion; it is towed by tugs between project locations. When it is going to be towed, battery operated running lights are temporarily installed. *Id.* at 444. The BT-213 has sleeping quarters, toilet facilities, a fully-equipped galley, locker rooms, freshwater deck tanks, diesel-powered electrical generators, and a gangway with railings. *Id.* at 443. The entire crew consists of two cooks and two janitors. It has no captain, engineer or deckhand. *Id.* The BT-213 is not intended to transport personnel, equipment, passengers, or cargo; it is not fitted with winches, running lights, a radar, a compass, engines, navigational aids, Global Positioning System, lifeboats, or steering equipment such as rudders. *Id.* at 445. The BT-213 does have a raked bow on each end and "two end tanks where the rakes are . . . for flotation." *Id.* It has a radio that is used to communicate with the dredge, bits or bollards that are used to tie it to the shore or to other vessels or structures, anchors, life rings, and portable water pumps. *Id.*

The Fifth Circuit in *Holmes* noted that the *Stewart* Court had significantly broadened the set of unconventional watercraft that must be deemed "vessels" under the Jones Act and the LHWCA. *Id.* at 448. Consistent with this expanded definition, the Fifth Circuit had no trouble concluding that the BT-213 was a vessel. *Id.* The Court explained that the BT-213 was "practically

capable" of transporting equipment, personnel and cargo; therefore, whether the primary purpose of the BT-213 was to transport housing modules, or whether it was moored to the bank at the time of the accident made no difference in the Court's decision. *Id.*

In the instant case, although the record does not provide as many specific comparable details about the PIPELINER V as in *Holmes*, there are some similarities between these two barges. Both barges have at least temporary running lights, both are transported long distances by the use of a tug boat, both have capabilities to be tied to other vessels or structures, or have other vessels or structures tied to them. While the BT-213 does not have any means of self-propulsion, the PIPELINER V has "limited means of self-propulsion" (more similar to the *Super Scoop* in *Stewart*) by use of anchors. Moreover, there is no evidence that the PIPELINER V was "permanently anchored or otherwise rendered practically incapable of maritime transport." Based on the evidence available, I find that the PIPELINER V, similar to the *Super Scoop* and the BT-213, is a "vessel".

Having found that the PIPELINER V is a vessel, the final inquiry is whether Claimant is considered a covered employee under the ACT or a member of a crew and therefore excluded from receiving compensation under the LHWCA. This will depend on 1) whether or not Claimant's duties contributed to the function of the vessel or the accomplishment of its mission, and 2) whether or not Claimant had a connection to a vessel in navigation, or to an identifiable group of such vessels, that was substantial in terms of its duration and nature. *Chandris,* 515 U.S. at 368. Based on the following, I find that Claimant satisfies the *Chandris* requirements for a seaman.

Claimant's duties as a galley hand contributed to the function of the vessel and the accomplishment of its mission. As held in *Chandris*, the Claimant need only show that he "does the ship's work." *Id.* This threshold is very broad and includes all who work at sea in the service of a ship. *Id.* In this case, the record has established that Claimant worked as a galley hand for the duration of his employment with Employer. At the hearing, Mr. Gautreaux explained the duties of a galley hand include janitorial work such as making beds, cleaning floors and bathrooms, washing dishes, tables and clothes and wiping down walls. As these tasks are necessary in order for a vessel to remain at sea for extended periods of time, I find

that Claimant's work as a galley hand contributed to the function of the vessel and the accomplishment of its mission[7].

Claimant also meets the second part of the *Chandris* test by having a connection to a vessel, or a fleet of vessels, that was substantial in both duration and nature. As articulated by the *Chandris* court, "it is not the employee's particular job that is determinative of seaman status, but the employee's connection to a vessel." 515 U.S. at 364. In *Chandris*, the Court used a number of Fifth Circuit decisions to formulate and clarify what is required in order for a claimant to have a substantial, in terms of duration and nature, connection to a vessel. *Id.* at 365-68. The *Chandris* Court adopted the Fifth Circuit's general rule of thumb that a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman. *Id.* at 371. However, the Court also noted that the 30 percent rule is a guideline and not an absolute.

In the instant case, Mr. Gautreaux testified, based upon his evaluations of Claimant's work record, that Claimant worked on the PIPELINER V about 38 percent of the time. The PIPELINER V was owned by Global Industries. Global Industries also owned a number of offshore barges, five of which Claimant worked on. Mr. Gautreaux stated that Claimant spent about 58 percent of his time working on Global Industries barges. In a recorded statement of February 11, 2003, Claimant stated that his official schedule rotation was 14 days on and seven days off, but he would often work 21 days on and 7 days off. (CX-11, p. 6) Claimant was spending extended periods of time onboard the PIPELINER V or another Global Industries vessel and during that time he was exposed to the hazards of the sea. Therefore, I find that Claimant satisfies the second part of the *Chandris* test, in that he had a substantial relation to not only the PIPELINER V, where he spent about 38 percent of his time, but also to a "fleet of vessels" owned by Global Industries.

Although Claimant's attorney pointed out in his brief that on the day of the accident Claimant had been assigned to the

[7] In *Bolfa v. Pool Offshore Company*, 623 F.Supp 1177 at 1179 (W.D. La. 1985), the United States District Court for the Western District of Louisiana, relying on a Second Circuit decision, found a galley hand to be a seaman. The Court noted that claimant, who was employed as a galley hand, was "aboard the vessel primarily in an aid of navigation." *Id.* (citing *Mahramas v. American Export Isbrandtsen Lines,* 475 F.2d 165, 170 (2nd Cir. 1973)) (hairdresser aboard crew ship held to be seaman for purposes of enforcement of seaman's remedies against vessel and operator).

SMI-6, which is allegedly a fixed platform, I find this assignment to be irrelevant. Mr. Gautreaux testified repeatedly that Claimant's assignment to the SMI-6 was only temporary. Claimant had requested work and his usual vessel, the PIPELINER V, did not need a crew change at that time, so Claimant was assigned to the SMI-6. Mr. Gautreaux explained that Claimant would not continue working on the SMI-6, but would return to his usual assignment for Global Industries since Global Industries is Employer's largest client and it had requested Claimant's services. The Supreme Court in *Chandris* addressed this issue specifically. 515 U.S. at 371-72. The Court saw "no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer." *Id.* at 371. Here, Claimant's duties for Employer were primarily sea-based activities.

Claimant has failed, based on the evidence provided in the record, to satisfy his burden of persuasion in proving that he is a longshoreman as opposed to a seaman. *See Greenwich Collieries*, 512 U.S. at 114. Therefore, I find Claimant's status to be that of a Jones Act seaman and he is not covered by the LHWCA. 33 U.S.C. 902(3)(g).

In view of the foregoing findings of fact and conclusions of law, the remaining issues concerning timely filing, entitlement to disability compensation, maximum medical improvement, average weekly wage and Section 33(g) preclusion are rendered moot.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Claimant's claim for benefits under the Act is **dismissed** for lack of jurisdiction.

ORDERED this 18th day of May, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge